SUPREME COURT, U. S.

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MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER, 1974 TERM

No. 74-1046

FREDERIKA BLANKNER,

Petitioner,

vs.

THE CITY OF CHICAGO,
a Municipal corporation; et al,

Respondents.

BRIEF OF RESPONDENTS SOUTHEAST CHICAGO COMMISSION AND JULIAN LEVI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner, who has been afforded an opportunity to a full hearing in the state trial court, who has pursued the full gamut of appellate review in the state courts, and who has sought, on two previous occasions, further review from this Court (*Blankner* v. *City of Chicago*, 408 U.S. 931 (1972) and *Blankner* v. *City of Chicago*, 409 U.S. 899 (1972)), has, by this proceeding, presented the substantial federal question necessary for the granting of *certiorari*.

STATEMENT OF THE CASE

This litigation arises out of the condemnation by the City of Chicago of a tenant-occupied building owned by the plaintiff and situated in an area designated as the "60th Cottage Grove Slum and Blighted Area Redevelopment Project—60th Cottage Grove" (hereinafter referred to as the "Urban Renewal Area"). (Pet. App. p. 33) *Chicago* v. *Walker (Blankner)*, 50 Ill. 2d 69 (1971).

In summary form, a petition to condemn the Petitioner's property was filed by the City of Chicago on April 1, 1968, in the Circuit Court of Cook County, Illinois. The Petitioner's property was one of several parcels declared to be situated in a slum and blighted area.

Petitioner filed a traverse and motion to dismiss by which she challenged: (a) the conclusion that the area was slum and blighted; (b) the right of the City to acquire her property by the exercise of eminent domain; and (c) that the taking of her property was for a public purpose. A hearing was held on the traverse and motion to dismiss. The City presented its evidence. Petitioner, however, declined to offer any evidence on the ground that the City had failed to establish a *prima facie* case. (*Chicago* v. *Walker, supra.*) (Pet. App. p. 42.)

The traverse and motion to dismiss were denied. A jury trial was subsequently held on the issue of just compensation and judgment was entered in the amount of $40,750.00.

Petitioner thereafter unsuccessfully appealed the condemnation proceeding to the Supreme Court of Illinois, which action culminated in the denial of *certiorari* by this Court on June 26, 1972. *Chicago* v. *Walker (Blankner)*, 50 Ill. 2d 69 (1971), *cert. denied,* 408 U.S. 931 (1972). A Petition for Rehearing thereafter filed by the Petitioner was denied by this Court on October 10, 1972. *Blankner* v. *City of Chicago,* 409 U.S. 899 (1972).

Finally, after running the full gamut of appellate review in the state courts, and after having unsuccessfully sought further review from this Court, Petitioner filed a multi-count complaint in the United States District Court for the Northern District of Illinois alleging, in essence, that the defendants unconstitutionally conspired to deprive her and members of her purported class of their property without due process of law and challenging the constitutionality of the Illinois Urban Renewal Consolidation Act of 1961 (Ch. 67½, §§ 91.101, *et seq., Ill. Rev. Stats.* (1973)) (Pet. App., pp. 33-57).

It is respectfully submitted that substantially the same issues raised in the instant proceeding were previously raised and presented to this Court by the Petitioner in 1972. (Pet. App. p. 33) *Blankner* v. *City of Chicago,* No. A-1026, No. 71-1549, 408 U.S. 931, 409 U.S. 899 (1972).

A three judge court was requested by Petitioner to consider the merits of Counts II, III and IV of the Complaint.

All of the defendants filed Motions to Dismiss upon the ground that the Petitioner had failed to state a claim upon which relief may be granted under 42 U.S.C. §§ 1983, 1985 and 1986.

On October 12, 1972, the District Court entered its Memorandum Opinion and Order denying the convening of a three judge court (Pet. App. A, pp. 1-2).

On April 18, 1973, the District Court entered its Memorandum Opinion and Order by which it refused to reconsider its denial of a three judge court, and granted the defendants' Motions to Dismiss (Pet. App. B, pp. 3-19).

The cause was thereafter appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed. (Pet. App., p. 20)

This Petition emanates therefrom.

REASONS FOR DENYING THE WRIT

I.

The Court Below Correctly Ruled That the Petitioner Was Barred From Relitigating Issues Previously Decided.

Contrary to statements of the Petitioner, the decision rendered by the District Court and affirmed by the Court of Appeals for the Seventh Circuit is not in conflict with the decisions of the Courts of Appeals of the Fifth and Second Circuits. Both *Mack* v. *Florida State Board of Dentistry*, 430 F. 2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960, and *Lombard* v. *Board of Education of City of New York*, 502 F. 2d 631 (2d Cir. 1974), cited by the Peti-

tioner, are distinguishable on the facts and totally inappropriate to this proceeding.

There is no conflict between the Circuits. Thus, Judge Gurfein states, in *Lombard*:

> "Of course, where a constitutional issue is raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment, Matter of Kovarsky v. Housing & Development Administration, 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E. 2d 882 (1972), the litigant has made his choice and may not have two bites at the cherry. See Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir. 1974)." *Lombard* v. *Board of Education of City of New York, supra,* at pp. 636-637.

Consistently, Judge McLaren states:

> ". . . [P]laintiff essentially asserts that her civil rights were violated in that defendants took advantage of unconstitutional state laws in order to deprive her of her property. It appears that plaintiff and amici curiae in the state court proceedings challenged the constitutionality of the state laws at that time and that the questions of law presented here were resolved against them. Although the federal civil rights claim is not completely barred by the doctrine of res judicata, it appears to this Court that plaintiff is barred from relitigating the issues previously decided. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591, 598 (1948); *Goss* v. *Illinois,* 512 F.2d 257, 259 (7th Cir. 1963). This holds true even when federal constitutional questions are decided by state courts. *Gart* v. *Cole,* 166 F.Supp. 129 (S.D.N.Y. 1958), *aff'd* 263 F. 2d 244 (2d Cir.), *cert. denied,* 359 U.S. 978 (1959). When the issue of the constitutionality of the statutes involved has already been resolved against a plaintiff, subsequent allegations that utilization of the statutes constitutes a denial of due process fail to state a claim." (Pet. App., p. 11)

II.

The Court Below Committed No Error In Ruling That the Petitioner Was Not a Proper Class Representative.

Rule 23(a)(3) of the Federal Rules of Civil Procedure requires that the claims of the named plaintiff be "typical of the claims . . . of the class." Noting that most members of the class of property owners purportedly represented by the Petitioner "have not already fully litigated a condemnation proceeding in the state courts," the Court below found the defenses of res judicata and collateral estoppel unique to the Petitioner and thus atypical. (Pet. App., p. 27)

III.

The Refusal by the Court Below to Convene a Three Judge Court Was Consistent With the Policy Enunciated by This Court in Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541 (1972).

The Court of Appeals for the Seventh Circuit expressly refused to follow the language of the District Court for the Eastern District of Pennsylvania in *Williams* v. *Osser,* 326 F. Supp. 1139 (1971), as contrary to the policy enunciated by this Court in *Board of Regents of the University of Texas System* v. *New Left Education Project,* 404 U.S. 541 (1972), and *Moody* v. *Flowers,* 387 U.S. 97 (1972). Petitioner has cited no other Circuit Court to the contrary.

IV.

The Very Nature of These Proceedings Requires That the Doctrines of Res Judicata and Collateral Estoppel Be Given Their Full Scope.

The issues presented in the instant proceeding are essentially the same issues presented to this Court in 1972.

(*Chicago* v. *Walker (Blankner)*, 50 Ill. 2d 69 (1971), *cert. denied*, 408 U.S. 931, rehearing denied, 409 U.S. 899 (1972)). Nothing new has been raised.

CONCLUSION

For the foregoing reasons, Respondents, Julian Levi and Southeast Chicago Commission, pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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